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*GTE Service Corporation*
*October 12, 1999*

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the Matter of | ) | |
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| Promotion of Competitive Networks in Local Telecommunications Markets | ) | WT Docket No. 99-217 |
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# COMMENTS OF GTE

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**COMMENTS OF GTE**

GTE Service Corporation and its affiliated communications companies (collectively, "GTE")[1] hereby respectfully submit these comments in response to the Commission's Notice of Inquiry ("NOI")[2] in the above-captioned matter.

## I. INTRODUCTION AND SUMMARY.

GTE welcomes this opportunity to address the impact of local and state government right-of-way regulations and taxation on telecommunications carriers. More specifically, GTE hopes that, based on its experiences as described herein, the

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[1] These comments are filed on behalf of GTE's affiliated domestic telephone operating companies, GTE Wireless Incorporated, GTE Media Ventures, and GTE Communications Corporation, Long Distance Division. GTE's domestic telephone operating companies are: GTE Alaska, Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., and Contel of the South, Inc.

[2] *Promotion of Competitive Networks in Local Telecommunications Markets*, FCC 99-141 (Notice of Inquiry in WT Docket No. 99-217) (rel. July 7, 1999) (hereinafter *NOI*).

Commission will take action to ensure that the pro-competitive goals of the Telecommunications Act of 1996 are not undermined by burdensome and discriminatory state and local regulations.

Some state and local governments have impermissibly exceeded their authority under Section 253(c) to manage and require fair and reasonable compensation for the use of public rights-of-way. As the examples provided by GTE demonstrate, some state and local governments have relied upon this limitation on the scope of Section 253 – the intent of which is to *eliminate* barriers to entry for telecommunications carriers – to do just the opposite. Impermissible state and local government-imposed regulations and fee assessments increase the cost of service and therefore constitute barriers to entering the market and providing telecommunications service. Accordingly, the Commission should utilize this proceeding to inform state and local governments that excessive regulation of public rights-of-way is preempted by Section 253.

As demonstrated through a number of specific examples, GTE has found that, in many instances, state and local taxation of telecommunications carriers is both discriminatory (as compared to non-telecommunications-related business) and excessive. Excessive and discriminatory taxes create barriers to entry, especially for small carriers. Such taxes also increase the digital divide by making it more difficult for consumers to purchase advanced telecommunications services. As such, GTE urges the Commission to assert its authority pursuant to Section 253 and declare that, in egregious circumstances, the FCC will step in and exercise its power of preemption over excessive or discriminatory state and/or local taxes. In addition, GTE encourages the Commission to work with standards bodies, such as the Advisory Commission on

Electronic Commerce, to develop a plan to phase out and prohibit discriminatory state and local taxation to allow for the growth of competition and to ensure that all Americans can afford current and future telecommunications services.

## II. THE COMMISSION SHOULD INTERPRET SECTION 253 TO ELIMINATE BARRIERS TO ENTRY CREATED BY STATE AND LOCAL GOVERNMENTS.

In its NOI, the Commission asks for comment from telecommunications service providers "regarding their rights-of-way management experiences, including examples of problems they have encountered, successful solutions to problems, and information regarding the prevalence of each of these types of experience."[3] GTE submits that the FCC should take this opportunity to send a clear signal that state and local governments may not impose on telecommunications providers excessive requirements that are inconsistent with Section 253(a) of the Communications Act. Specifically, the Commission should issue a declaratory ruling that limits the scope of the localities' power to extract fees, prevents unnecessary and burdensome regulation, and reasserts the Commission's jurisdiction over national telecommunications policy.[4] Only such a clear policy pronouncement will provide the necessary deterrent to localities considering vast right-of-way regulation.

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[3] *NOI* at ¶ 79.

[4] GTE does not support federal price regulation for public rights-of-way. The Commission should only issue guidance that such fees should be based on costs.

### A. The Statute Substantively Limits the Scope of Local Power over Public Rights-Of-Way

As an initial matter, it is of central importance in any discussion of state and local management of public rights-of-way to acknowledge the goals and purposes of the Telecommunications Act of 1996. Section 253 provides for the preemption of any state or local requirements that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[5] Section 253 does not restrict state and local governmental authority[6] to manage public rights-of-way or to require compensation from telecommunications providers as long as such authority is exercised on a competitively neutral and non-discriminatory basis and such compensation is both fair and reasonable and is publicly disclosed.[7]

The FCC and the courts have been clear in interpreting these provisions to void local government efforts to regulate in a manner that frustrates the pro-competitive goal

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[5] 47 U.S.C. § 253(a).

[6] Some local governments, however, have attempted to regulate or charge fees without statutory authority. *See AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582 (N.D. Tex. 1998), *summary judgment granted*, *AT&T Communications of the Southwest, Inc., et al. v. City of Dallas, Texas*, 52 F. Supp. 2d 763 (N.D. Tex. 1999); *see also AT&T Communications of the Southwest, Inc. v. City of Austin, Texas*, 975 F. Supp. 928 (W.D. Tex. 1997). Where a local governmental entity does regulate or charge fees in violation of state law and such regulation has the prohibitory effect under section 253(a), then it is clearly unlawful. In these particular cases, one need not inquire further to determine whether such regulation or fees otherwise comports with section 253(c)'s fair and reasonable, competitive neutrality, and nondiscrimination requirements.

[7] 47 U.S.C. § 253(c). Section 253(c) operates as a limitation on any authority state or local governments may otherwise have. Local governments may also be further restricted in their ability to manage public rights-of-way by state law.

of the 1996 Act, a goal which is achieved, in part, through Section 253(a)'s prohibition against requirements which create barriers to providing interstate or intrastate telecommunications service, and by Section 253(c), which further limits the kind of authority that state and local governments may exercise with respect to public rights-of-way being used to deliver such service. Of course, as the FCC and the courts have also acknowledged, Section 253(c) "preserves" the authority[8] of local governments to manage public rights-of-way. But it does so in a manner that is restricted to a rather discrete class of management activities necessary to preserve the physical integrity of streets and highways, to control traffic, to foster public safety, and to exercise other traditional and legitimate police powers.[9] State and local governments may also recoup

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[8] *See* note 6, *supra*.

[9] *See, e.g., City of Dallas,* 8 F. Supp. 2d at 591-92; *Bell Atlantic-Maryland, Inc. v. Prince George's County, Maryland*, 49 F. Supp. 2d 805 (D. Md. 1999); *BellSouth Telecommunications, Inc. v. City of Coral Springs*, 42 F. Supp. 2d 1304 (S.D. Fla. 1999); *TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396 (1997); *Classic Telephone, Inc.,* 11 FCC Rcd 13082 (1996). GTE concurs that proper municipal right-of-way management includes: regulating the time or location of excavation to preserve effective traffic flow; preventing hazardous road conditions; minimizing noise; requiring that facilities be placed underground, rather than overhead, consistent with the requirements imposed on other utility companies; requiring fees to cover the appropriate apportioned costs of increased street repair and paving resulting from repeated excavation; promoting and coordinating joint trenching projects; requiring fees to cover the costs of reviewing plans and inspecting excavation work; requiring the use of particular kinds of excavation equipment or techniques suited to local circumstances to minimize the risk of major public health and safety hazards; enforcing local zoning regulations; and requiring indemnification against any claims of injury arising from the company's excavation. *See Classic Telephone, Inc.*, 11 FCC Rcd at 13103 (citing statement of Sen. Feinstein, 141 Cong. Rec. S8172 (daily ed. June 12, 1995); *TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396 (1997), *petition for partial reconsideration denied,* 13 FCC Rcd 16400 (1998); *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, 11 FCC Rcd 18223 (1996).

costs that have been incurred as a result of this management activity.[10] In essence, the statute preserves existing state and local authority over inherently "local" concerns, while insuring that such authority should not be exercised in a manner that frustrates the pro-competitive and deregulatory goals of the 1996 Act.

Despite this rubric, some governments have attempted to impose on telecommunications service providers onerous and burdensome regulations, including exorbitant fees, which in many cases effectively constitute revenue-raising measures, in exchange for access to public rights-of-way. Fortunately, however, courts have recognized that imposing regulation that is unrelated to a provider's use of public rights-of-way or imposing fees which are unrelated to the telecommunications provider's use of public rights-of-way is simply improper and contrary to the Act.[11]

As one federal court explained, "any franchise fees that local governments impose on telecommunications companies must be directly related to the companies' use of the local rights-of-way, otherwise the fees constitute an unlawful economic barrier to entry under section 253(a)."[12] This would include, for example, right-of-way use fees calculated as a percentage of gross receipts.[13] Indeed, as the court found,

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[10] *See, e.g., Bell Atlantic-Maryland, Inc. v. Prince George's County, Maryland*, 49 F. Supp. 2d 805, 817 (D. Md. 1999).

[11] *See generally City of Dallas, supra* note 6.

[12] *Bell Atlantic-Maryland, Inc.*, 49 F. Supp. 2d at 817; *see also City of Dallas*, 8 F. Supp. 2d at 593.

[13] *See, e.g., Bell Atlantic-Maryland, Inc.*, 49 F. Supp. 2d at 818 (holding that a right-of-way usage fee based on gross receipts violates the 1996 Act).

"local governments may not set their franchise fees above a level that is reasonably calculated to compensate them for the costs of administering their franchise programs and of maintaining and improving their public rights-of-way."[14] Attempts to categorize the imposition of such impermissible fees on new entrants (*i.e.,* wireless providers) as "competitively neutral and nondiscriminatory" have been rejected out of hand:

> This argument seems to boil down to an assertion that because some providers agreed to this ordinance and are now subject to it, all other providers must be subject to it as well. If the ordinance is found to be preempted by State and federal law, however, it makes no difference that other providers have agreed to the preempted ordinance.[15]

In addition, some local governments have impermissibly attempted to broaden the scope of their right-of-way authority to extract payments with respect to wireless radio transmissions passing over public rights-of-way. Radio transmissions, of course, do not burden public streets, nor do they impose any costs on local jurisdictions. Further, Section 253(c) limits state and local authority to the collection of "fair and reasonable compensation . . . for use of public rights-of-way." Although Section 253(c) does not define what is meant by "use" of public rights-of-way, both the Commission and the courts have concluded that radio transmissions through the air above public rights-of-way do not constitute "use."[16] Accordingly, the FCC should clearly rule that

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[14] *Id.*

[15] *City of Dallas*, 8 F. Supp. 2d 582, 593 (N.D. Tex. 1998). In addition, any attempt to impose such fees upon wireless providers would be a violation of Section 332(c)(3), which preempts state and local authority to regulate the entry of wireless providers. *See* 47 U.S.C. § 332(c)(3).

[16] *See, e.g., Definition of a Cable Television System*, 5 FCC Rcd 7638, 7642 (interpreting the phrase "uses any public right-of-way" in Section 602(6) of the 1986

(Continued...)

any local government attempts to require compensation from wireless providers based on the passing of radio transmissions over public rights-of-way are preempted by Section 253(a).

### B. Some Local Governments Have Attempted to Exploit Their Control Over Rights-Of-Way to Extract a Wide Variety of Concessions from Telecommunications Carriers.

In its *NOI*, the Commission sought information from commenters "regarding their right-of-way management experiences, including examples of problems they have encountered, successful solutions to problems, and information regarding the prevalence of each of these types of experiences."[17] As an initial matter, GTE respects the rights of state and municipal governmental entities to regulate local matters. In many cases, local governments have acted reasonably to regulate public rights-of-way. However, the Commission must send a signal that abusive practices that undermine efficient competition will not be countenanced by the agency. GTE has become increasingly concerned that there is a disturbing trend of local governments across the country broadly interpreting Section 253(c) as conferring vast jurisdiction on state and local governments to regulate telecommunications providers' use of public rights-of-

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(...Continued)
Cable Act, the Commission concluded that "Congress did not intend to include within the meaning of the term 'use' of a public right-of-way the mere passing over of such a right-of-way by electromagnetic radiation. . . . We believe it is well established that radio transmissions . . . do not use public rights-of-way"); *AT&T Communications of the Southwest, Inc., et al. v. City of Dallas*, 52 F. Supp. 2d 756, 761-62 (N.D. Tex. 1998) ("This Court is also unpersuaded that transmitting microwaves through the air . . . constitutes 'use' of Dallas's rights-of-way.").

[17] *NOI* at ¶ 80.

way.[18] The statutory language of Section 253(c) clearly does *not* confer any power upon state or local governments; on the contrary, it simply makes clear that "[n]othing in [Section 253] *affects* the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation . . .."[19]

In addition, GTE has encountered a number of nationally based consultants who have recommended that cities adopt extraordinary right-of-way measures, including many that are in direct conflict with federal and/or state law. Many of these consultants do not understand, and often disregard, state laws. The result is a mishmash of right-of-way ordinances that must be carefully reviewed on a case-by-case basis and with attention paid to the unique proscriptions of state law.

As detailed in the attached chart,[20] local governments have imposed one or more of the following conditions on right-of-way use: (1) exorbitant fees which bear no relation to use of the rights-of-way or the burdens imposed upon municipalities by such use; (2) burdensome, costly, or unnecessary regulation, including requiring: (a) extensive or unnecessary permit application or other review procedures, (b) submission of intrusive competitive or proprietary information, (c) development of costly GIS mapping systems, and (d) professional engineering certification on minor or non-

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[18] In particular, where municipalities regulate in violation of state law, one can infer that these municipalities may have believed that Section 253(c) conferred upon them some regulatory jurisdiction which heretofore had not existed. *See generally City of Dallas, supra* note 6; *AT&T Communications of the Southwest, Inc. v. City of Austin*, 975 F. Supp. 928 (W.D. Tex. 1997).

[19] 47 U.S.C. § 253 (emphasis added).

[20] *See* Appendix A.

invasive right-of-way activities; and (3) regulation of matters traditionally and legally within the province of the FCC and state commissions. This last category is often referred to as "third tier" regulation and could include, for example, (a) prescribing the type, location, or quality of service; (b) establishing financial, organizational, and technical qualifications; or (c) prescribing unreasonable or unnecessary transfer, reorganization, and change-of-control restrictions.[21]

Onerous, costly, and burdensome regulation has taken many forms and seems limited only by the imaginations of the various consultants advising the cities. The attached chart outlines numerous examples of such regulation. This chart represents only a sampling of the issues GTE and other telecommunications providers are encountering nationally. Many jurisdictions have adopted right-of-way ordinances but have not sought to enforce them. This results in great uncertainty as to whether or when the hammer will fall.

Finally, as described above and in the attached chart, local governments have regulated in areas traditionally and legally within the purview of the FCC or state regulatory agencies. Such "regulation" not only goes against the competitive thrust of the 1996 Act, but, as a practical matter, causes undue and unnecessary burdens on the telecommunications industry. Many times, the end result of such efforts is merely a duplicative reproduction of public records with no rational relation to right-of-way

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[21] If effective, these provisions would be tantamount to a third governmental tier conducting a merger review process.

management. Indeed, in some cases this may also result in public disclosure of information that the industry is justified in categorizing as confidential and proprietary.

These policies are tremendously damaging to the public interest and forestall the rapid and efficient deployment of a competitive and innovative telecommunications infrastructure. This extensive patchwork of requirements delays construction schedules and service provisioning, introduces uncertainty into business planning and operational requirements, and ultimately increases the cost of services to the consumer.[22] Accordingly, the Commission should take this opportunity to send a clear signal that state and local governments cannot impose such excessive and impermissible requirements upon telecommunications providers.

## III. THE COMMISSION SHOULD CLARIFY THAT DISCRIMINATORY TAXES CONSTITUTE UNREASONABLE BARRIERS TO COMPETITION IN THE TELECOMMUNICATIONS MARKETPLACE IN VIOLATION OF SECTION 253.

The Commission requests comment on whether state and local taxes have been excessive or applied in a discriminatory manner against telecommunications carriers. GTE submits that the answer to both of these questions is, without question, "yes." As detailed below, it has been GTE's experience that telecommunications carriers face tax rates and regulations much more onerous than those faced by non-telecommunications businesses. Accordingly, GTE, while recognizing that these are primarily state and local issues, nevertheless urges the Commission to assert its authority pursuant to

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[22] These effects may be particularly felt in less developed, rural areas. Heavy-handed regulation in these less profitable areas may dissuade infrastructure development altogether.

Section 253 and declare that, in egregious circumstances, the FCC will step in and exercise its power of preemption over excessive or discriminatory state and/or local taxes. In addition, GTE encourages the Commission to work with standards bodies, such as the Advisory Commission on Electronic Commerce, to develop a plan to phase out and prohibit discriminatory state and local taxation to allow for the growth of competition and to ensure that all Americans can afford current and future telecommunications services.

### A. Telecommunications Carriers, Much More So Than Other Business Entities, Face a Burdensomely High and Incredibly Complex Web of State and Local Taxes.

The level of taxation of the telecommunications industry is one of the highest in the United States (along with alcohol, tobacco, and gasoline). Discriminatory taxes, in the nature of fees, property taxes, and taxes on the provision of telecommunications services, are imposed at both the state and local levels.[23] This discrimination occurs not only between general business (*i.e.*, non-telecommunications-related industries) and the telecommunications industry, but also between providers of different types of telecommunications services. In addition to the inequitably high tax rates imposed on telecommunications carriers, the sheer number of vastly different jurisdictions and taxing methodologies creates a tremendous administrative burden. The effects of these discriminatory practices impact not just telecommunications service providers, but consumers as well.

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[23] Federal taxation suffers from similar problems.

The Telecommunications Tax Task Force of the Committee On State Taxation ("COST") recently completed a 50 state study to compare the relative burdens of taxation on telecommunications versus general business.[24] The results of the study clearly show that both telecommunications providers and customers are burdened by a number of inequities between the tax treatment of general business and telecommunications, including:

- the rates of taxation;
- the number of taxes;
- the number of types of taxes;
- the number of returns filed annually; and
- the number of taxing jurisdictions.

These excessive and discriminatory taxes imposed upon telecommunications carriers lead to higher prices for consumers and prohibitively high costs for existing and new providers to set up, maintain and administer systems to accurately bill, collect, and remit transactional taxes.[25]

In comparing the effect of state and local taxes, the COST study assumed that both hypothetical entities, the telecommunications carrier and the general business, had a nexus in each taxing jurisdiction in the state. The study further assumed that the telecommunications carrier offered local, long distance, and wireless telecommunications services. The results of the study reveal that:

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[24] A copy of the COST study is attached as Exhibit B.

[25] A transactional tax is a tax imposed upon or measured by the amounts paid for products and services, regardless of whether the legal obligation to pay the tax is placed upon the vendor or customer.

- A nationwide provider of telecommunications must deal with 310 different taxes[26] versus 103 for a general business (essentially one state transactional tax and one local transactional tax per state);
- The average state and local tax rate on telecommunications is 14.15% (over 18% if federal taxes and fees are included) versus 6.31% for general business;
- A nationwide provider of telecommunications must maintain 687 different tax bases as compared to 184 for general business (thus for each of the 687 tax bases and for each of the thousands of products, a determination must be made as to the taxability of the product or service);
- A nationwide provider of telecommunications must file 55,748 transaction tax returns per year (*plus* property and income tax returns) as compared to 7,237 for general business
- Approximately 14 states apply property tax to the intangible value of telecommunications property while the intangible values of general businesses are not taxed; and
- Approximately 14 states apply higher property taxes to the tangible property of telecommunications providers than to that of general business.

The quantity and complexity of the tax collection and remittance requirements currently placed on telecommunications providers constitute a significant barrier to entry. As the COST study shows, providers must be equipped to accurately and timely remit over 310 different taxes, on behalf of 10,857 taxing jurisdictions, on 55,748 tax returns, per year. The substantial capital investment required to establish this capability greatly impedes the ability of smaller carriers (who cannot spread these fixed costs across a large number of customers) to enter the market and compete.

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[26] The high number of different taxes that a telecommunications carrier must process result from the imposition of a variety of types of taxes, including excise taxes (*e.g.*, E-911), gross receipt taxes, and a utility tax.

### B. Burdensome State and Local Taxes Are Delaying the Introduction and Proliferation of Next-Generation Telecommunications Services.

The COST study results were presented to the Advisory Commission on Electronic Commerce ("ACEC") on September 14, 1999. One of ACEC's duties is to look at ways to simplify the taxation of telecommunications. ACEC is also evaluating the extent to which Internet access should be taxed by state and local jurisdictions. One concern is that Internet service providers ("ISPs") will be required to collect and remit the multitude of state and local taxes currently applied to other telecommunications carriers – a concern that is authenticated by the COST study results. Should this occur, ISPs would face the same barriers to entry that currently exist in the broader telecommunications market, and consumers would likely be forced to pay higher prices. It is GTE's hope that the ACEC will recommend, and Congress will enact, radical reforms to state and local taxes as they are applied to all telecommunications service providers.

The result of the higher tax rates applied to telecommunications has and will continue to exacerbate the digital divide: while taxation (and the correspondingly higher end user rates) may not decrease the number of subscribers for basic services, it is quite likely that taxation *will* deter many customers from purchasing broadband services. For example, the Progress and Freedom Foundation estimates that high

telecommunications taxes, should they continue, will result in between 1.2 million and 4.2 million households being denied broadband Internet access by 2002.[27]

Convergence of the communications industries also dictates the need for radical reform. As the distinctions between telecommunications, Internet, cable, and other services continue to disappear, it becomes increasingly difficult for businesses and state and local governments to apply service-specific taxes. Burdensome state and local taxes also greatly impede the ability and incentive of telecommunications carriers to bundle their products and services. First of all, carriers are concerned that the discriminatory taxation of bundled offerings will result in higher tax levels – and therefore higher prices – than if the individual components were offered separately.[28] In addition, the sheer number of locally imposed taxes often makes it extremely difficult for carriers to determine the appropriate jurisdiction(s) in which to pay taxes on their offerings, particularly wireless services. Where bundled offerings are concerned, this confusion grows exponentially. These concerns, combined with uncertainty regarding inter-jurisdictional allocation and the potential for taxation by multiple jurisdictions, seriously undermine the efficiencies which bundling would otherwise provide.

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[27] Jeffrey A. Eisenbach, Ph.D., The Progress & Freedom Foundation, *The High Cost of Taxing Telecom*, Sept. 6, 1999, available at <http://www.pff.org/telecomtax.htm>.

[28] For example, this could occur if a bundled offering – consisting of a taxable product or service and a nontaxable product or service – is taxed as though the bundle was composed entirely of taxable products or services. Similar results could arise where the various bundled elements would normally be taxed at varying rates, but the bundled offering is taxed at the rate of its highest-taxed component.

### C. GTE Submits the Following Examples of Burdensome Taxation Policies.

The following sections discuss specific examples of discriminatory taxes and their burdensome impact on telecommunications carriers.

*Discriminatory Property Taxes.* The State of Kentucky has consistently discriminated against telephone companies through the valuation and taxation of company property. The state centrally values each telecommunications company as a unit using cost, capitalized earnings, and market indicators. The excess of the assessed value over the value of the tangible assets is regarded as intangible assets. Kentucky then taxes these intangible assets as operating property; as a result, they are subject to both state and local tangible personal property tax rates, the combined effect of which is often in excess of $1 per $100. In comparison, the state intangible property rates range from $.015 per $100 to $.25 per $100. This discriminatory treatment creates enormous property tax burdens for telecommunications companies. For telecommunications resellers who have little or no property in the state, the assessed property tax can exceed the value of their tangible property in the state. At least one telecommunications reseller, with tangible property worth approximately $33,000 in the state, received an assessment in 1999 valuing Kentucky property at $12,000,000. The assessment would result in property tax of over $120,000 – almost four times the amount of property located within the state. Both this assessment and the prior two years' assessments (valuations of $8,000,000 and $1,000,000) are under protest. Furthermore, Kentucky continues to apply excessive values to telecommunications

companies. Its arbitrary valuation methodologies and application of tangible property tax rates to intangible values results in property taxes that are extremely discriminatory.

In contrast, other Kentucky taxpayers are assessed locally. As a result, unit values are not applied to capture intangible values. Once valued, taxpayer property is taxed based on the actual type of property owned (*i.e.*, tangible personal property is taxed at tangible personal property rates; intangible property such as bonds or notes are taxed as intangible property). The inequitable valuation and taxation of the property of telecommunications service providers vis-à-vis other taxpayers constitute significant barriers to entry in Kentucky.

Similarly, Ohio continues to discriminate against certain telecommunications companies by applying an 88 percent assessment ratio to the value of pre-1995 investment of landline telephone companies. In comparison, the state applies a 25 percent assessment ratio to post-1994 investment of telephone companies and to *all* investments of wireless and long distance carriers. This results in property tax assessments on telephone companies that are over twice that of their competitors inside and outside the industry.

*Discriminatory Transactional Tax Rates.* The COST study shows that the average combined state and local transactional tax rate is 14.15% for telecommunications services versus 6.31% for general business.[29] Thus, the average

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[29] The highest rates of taxation applied to telecommunications are found in Texas (28.56%), Florida (24.47%), Nebraska (24.15%), Missouri (23.79%), Colorado (23.7%), Oklahoma (21.71%), Pennsylvania (21.46%), New York (21.3%), Maryland (20.92%), and Kansas (20.59%).

of each state's telecommunication combined rate is more than 235% of the combined rate applied to general business.[30] Absent action by the Commission, the excessive transactional tax rates being applied by state and local governments to telecommunications carriers will continue to artificially raise the costs of providing telecommunications services.

### D. The Commission Should Recognize the Costs and Confusion Created by Burdensome State and Local Taxes and Declare that They Constitute Barriers to Entry under Section 253.

The complexity of setting up and maintaining systems to accurately apply multiple levels of state and local taxes to the multitude of telecommunications services should be readily viewed as a serious competitive issue – *i.e.*, a barrier to entry. This complexity is a tremendous burden on the telecommunications industry. As indicated previously, the industry also bears a tremendous property tax burden in many states with regard to discriminatory property taxes. Ultimately, the distinctions between telecommunications service providers and general business should be eliminated over time.

To address the generally adverse taxing environment, GTE recommends that the Commission declare that excessive and discriminatory taxes can constitute barriers to entry under Section 253(a) that can be preempted by the FCC. Such a general ruling would provide guidance to state and local taxing jurisdictions in evaluating whether their individual taxes comply with the goals of the 1996 Act. In addition, GTE recommends

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[30] The most extreme differences in rates are found in Virginia (424%), Maryland (418%), Nebraska (371%), Missouri (354%), Kansas, (348%), Texas (346%), Oklahoma (334%), Kentucky (328%), Florida (326%), and North Carolina (308%).

that the FCC review and support the industry's recommendations to the ACEC and other tax advisory bodies for simplification and removal of discriminatory taxes.

## IV. CONCLUSION

In order for the Commission to achieve the pro-competitive goals of the 1996 Act, it must exercise its authority under Section 253 to eliminate state and local government-imposed barriers to entry. Accordingly, and for the foregoing reasons, GTE urges the Commission to take steps to curb the growing trend of state and local public right-of-way regulation and fee assessments and excessive or discriminatory taxation, all of which serve to prohibitively raise the cost of competitive entry. Finally, GTE encourages the Commission to work with standards bodies, such as the Advisory Commission on Electronic Commerce, to develop a plan to phase out and prohibit discriminatory state and local taxation of the telecommunications industry.

Respectfully submitted,

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October 12, 1999

## CERTIFICATE OF SERVICE

I, Jacquelyn Martin, hereby certify that on this 12th day of October, 1999, I caused copies of the foregoing "Comments of GTE" in WT Docket No. 99-217 to be sent via hand-delivery to the following:

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Jacquelyn Martin

# APPENDIX A:

# Ongoing Public Right-of-Way Issues: Examples of Local Government Right-of-Way Provisions

**GTE**

**Ongoing Public Right-of-Way Issues**

**Examples of Local Government *Right-of-Way* Provisions***

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| A. Burdensome application, franchise, and operating requirements imposed unrelated to ROW use. (Consequences of noncompliance may include denial of franchise, denial of access to and use of ROW, and/or criminal prosecution.) | 1. **Dallas, Texas**<br><br>Among the demands by the City found unlawful were disclosure of detailed financial and operational information, dedication of fiber optic strands and conduits to the City for the City's free and exclusive use, submission to detailed City audits, notification to the City of all communications with the FCC, SEC, and PUC related to services provided in Dallas, and payment of four percent of all gross revenue from whatever source arising out of business operations in Dallas. | Litigation involving GTE remains pending in the U.S. District Court for the Northern District of Texas, however the court has, to date, ruled that a city lacks authority under federal and state law to impose franchise conditions on telecommunications providers use of ROW unrelated to use or impose fees that are unrelated to ROW use. AT&T Communications of the Southwest, Inc. v. City of Dallas, 8 F. Supp.2d 582, summary judgment granted 52 F. Supp.2d 763 (N.D.Tex.1999). |
| | 2. **City in Washington**<br><br>The original City ordinance, enacted in April, 1998 demanded that ROW applicants provide extensive and duplicative information, such as the identity of persons with "working control" over the applicants, detailed service, mapping, and provisioning information, and copies of state certification. The City could prohibit ROW use based on its own determination of whether the applicant is in compliance with state and federal law. Washington constitutional and statutory law allows telephone companies to use ROW without a franchise. Washington ordinances in other cities have also disregarded this legal right. | After extensive and costly negotiation lasting in excess of twelve months, GTE and the City reached a compromise agreement and the City revised its original ordinance. |

* The following is for illustrative purposes only. GTE does not represent that the following information is comprehensive as to the scope of the issues and number of jurisdictions in which it has encountered or is presently encountering onerous and burdensome right-of-way franchises or permitting requirements.

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| | 1. **City in Virginia**<br><br>City seeks copies of all reports (annual form "M" and operational repair statistics, etc.) that are filed with the Florida Public Service Commission. | Attempting to delete the provision during current negotiations. |
| | 2. **City in Virginia**<br><br>Includes requirement of a description of utility services to be offered and sufficient information to determine whether such service is subject to cable franchising. | Negotiations pending: no known date anticipated for resolution, if any. |
| | 3. **City in Virginia**<br><br>Requires detailed description of transmission medium to be utilized in provision of services. Such a requirement goes beyond the city's reasonable inquiry as to what is being placed in the ROW and results in the disclosure of confidential competitive information unrelated to use or occupancy of the ROW. Full disclosure of transmission media and the detail requested by the city would also entail disclosure of the type of services intended, again, not reasonably related to ROW management and the disclosure of which is detrimental to the competitive interests of telecommunications providers. | Negotiations pending: no know date anticipated for resolution, if any. |
| | 4. **City in Virginia**<br><br>The City seeks documentation establishing all "other" government "approvals". Included in this request are copies of certification or other documentation from the State corporation commission and other State regulatory agencies. Much of this documentation is already public record and obtainable by the City upon request if it truly has a legitimate inquiry. However, repeated duplicative reproduction of this documentation | Negotiations pending: no know date anticipated for resolution, if any. |

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| | serves merely to unnecessarily and unreasonably burden telecommunications providers and stifle competition. | |
| | 5. **City in Virginia**<br><br>City has demanded unreasonable record retention, requires that all books and accounts be maintained in accordance with the City's ordinance, even if this exceeds or conflicts with requirements imposed by the FCC, SEC, IRS, and state utility commission. The City also seeks to determine and dictate the "manner" in which a provider's books and records are kept. Such proscriptions are beyond the scope of ROW management and serve merely to increase the administrative and cost burdens of telecommunications providers. | Negotiations pending: no know date anticipated for resolution, if any. |
| | 6. **City in Washington**<br><br>In the recital clauses of the revised Ordinance, the City recited language indicating that ROW has been "acquired" by the City at "great cost and expense" and the City purports to seek recovery of this "cost". Such characterization is not accurate as most public ROW is acquired by state grant or private dedication at no cost to a city. | None. |
| | 7. **City in Nebraska**<br><br>City approval required on interconnection or resale agreements with other providers and filing of such agreements with the City. Such requirements are not within local jurisdiction and results in competitive disadvantages to the disclosing providers. | None. |

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| | 8. **City in Nebraska**<br><br>The City of Dallas had originally imposed a fee of 4% gross revenues from all business operations in the city, regardless of the source or whether they derived from any telecommunications infrastructure or other facilities located in or on ROW. | The Court ruled to date that such a broad compensation scheme was unrelated to ROW use and in violation of federal law. AT&T Communications of the Southwest, Inc. v. City of Dallas, 8 F. Supp. 2d 582, summary judgment granted 52 F. Supp.2d 763 (N.D.Tex.1999). |
| B. Excessive, unreasonable (including "in-kind" services) or duplicative services | 1. **County in Washington**<br><br>The County has created an elaborate compensation scheme which requires an annual $1.00 per lineal foot fee on "Prime Urban" areas but also demands, if the total length of the installation is in excess of 1,000 linear feet, requires the provision of free fiber and conduit to the exclusive use of the County. If a company installs single-mode fiber, it must install, free of charge no less than 12 strands of the same type of fiber for the exclusive use of the County in perpetuity. | None. |
| | 2. **Ft. Wayne, IN**<br><br>City has attempted to enforce an ordinance which grants, in perpetuity, the city, "the right to install and maintain, free of charge, upon any poles and within any pipes or conduits or other facilities of any public utility located within the public rights-of-way, any facilities desired by the City which specifically serve public safety purposes..." | GTE filed a complaint with the Indiana Utility Regulatory Commission alleging violations of the Federal Telecommunications Act of 1996, violation of Indiana law which limits municipalities to "direct, actual, and reasonably incurred costs", and unlawful takings claims. Awaiting public hearings and subsequent Commission Order. |
| | 3. **City of Virginia**<br><br>Imposes a local "rights-of-way tax" on telecommunications companies and other to pay for general road maintenance and upkeep, which tax is unrelated to burden placed by user of ROW. | None. |

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| | 4. **City of Virginia**<br><br>City added a monthly 50-cent per line fee to residential phone bills to pay for state-of-the-art computer labs in city schools. City residents immediately protested the fee as another tax, which will run until 2005. | GTE is not presently challenging this city's ROW fee, however, it strongly objects to ROW fees being utilized as a source of general revenue funding. |
| | 5. **City of Virginia**<br><br>City has attempted to extract an unreasonable franchise fee for the privilege of placing a few miles of fiber-optic cable. | GTE refused to pay an unreasonable franchise fee did not sign a franchise agreement with City. GTE has leased facilities from other providers as an alternative to negotiating with the city. |
| | 6. **City of Illinois**<br><br>Requires franchise fee in the form of "in-kind" services (free business concession lines) in addition to monetary payment. | Negotiations pending regarding whether City will implement the Illinois State Infrastructure Maintenance Fund which will eliminate "in-kind" compensation. |
| | **7. City of Florida**<br><br>Municipality has requested GTE to participate in its downtown beautification project which requires the mandatory undergrounding of 90% of telecommunication facilities within a specified time-frame. This relocation project would be at GTE's sole cost and expense. | Negotiations pending. |
| | 8. **Several cities in Florida**<br><br>Franchises require telecommunications company to provide, free of charge, the installation of three public pay phones. In addition, the City's are to receive 15% of the receipts from all coin telephones located within the City. | GTE is attempting to negotiate with at least one of these cities to delete such provisions. These provisions appear contrary to BellSouth Telecommunications, Inc. v. City of Coral Springs, 42 F. Supp.2d 1304 (S.D. Fla. 1999.) |
| | 9. City in Oregon<br><br>City attempted to collect fees in excess of those allowed under Oregon state law which permits imposition of a privilege tax on telecommunications in the form of a percentage of revenues in | GTE refused to sign an agreement that it believed to be in violation of federal and state law. After notice from GTE, the City agreed to drop the objectionable provisions. |

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| | lieu of any additional fees or charges for use of ROW. ORS 221.515. | |
| | 10. **City in Washington**<br><br>City requires excessive, separate fees for what it terms "Invasion Mitigation". This is a street degradation fee, however there are serious and costly implications in this sort of fee. Among the issues facing industry pertaining to this type of fee are: 1- the amount of the fee is not substantiated by empirical data demonstrating that the City does, in fact, experience degradation to the useful life of the street; and 2- it is only applicable to telecommunications providers and fails to provide for allocation among different utilities who cut into street ROW. Under Washington law, local governments may only seek compensation from telecommunication providers using ROW which are designed to recover actual expenses directly related to managing ROW. Fees in excess of actual expenses constitute unlawful additional compensation and are barred by RCW 35.21.865. | None. |
| | 9. **City in Washington**<br><br>Ordinance was enacted by the City imposing civil and criminal penalties for certain violations of the ROW ordinance. | Notwithstanding that a recent federal court has ruled that even the mere threat of criminal sanctions would constitute a prohibitive barrier to entry under 45 U.S.C. § 253, GTE was unable to successfully remove this provision during negotiations. See _____. |
| C. Noncompliance penalties: revocation, criminal sanctions, fines | 1. **City in Virginia**<br><br>Franchise requires written approval of any transfer/assignment of Control. | Attempting to negotiate out of new franchise agreements so that approval is not required for corporate mergers, <u>etc</u>. |
| D. Transfer/Assignment Restrictions and Prohibitions | 1. **Several cities in Florida**<br><br>Franchises require written approval of any transfer/ assignment of control. | Attempting to negotiate out of new franchise agreements so that approval is not required for corporate mergers, etc. |

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| | 2. **City in Florida**<br><br>Franchise language that if any higher rate is allowed by the state legislature or any favorable terms are granted another municipality, then the more favorable terms will apply to the City. | Negotiations pending. |
| E. Most-Favored Nations Treatment | 1. **City in Florida**<br><br>Franchise agreement includes termination language that would require company to cease operations for 365 days, and in the event of termination of the contract, remove or abandon all facilities and make abandoned facilities safe. All abandoned facilities become the property of the City. | Negotiations pending. |
| F. Unreasonable Franchise Termination Language | 1. **Other Florida cities (also include less egregious, yet troublesome termination language)**<br><br>Many cities provide that upon termination of ROW agreement, the telecommunications company essentially agrees to sell its assets and cease operations in the city. | GTE will attempt to negotiate in good faith with as many cities as possible. |
| | 2. **City in Virginia**<br><br>Termination language specifies exactly how facilities are to be valued and sold by the existing franchisee in the case of termination and outlines all steps necessary for termination of telecommunications franchise. Requires sale of facilities to City upon termination. | Negotiations pending. |
| | 3. **Illinois Municipal League**<br><br>In September 1998, the Illinois Municipal League (IML) began to distribute advocate its model right-of-way ordinance to thousands of Illinois municipalities. The IML proposed ordinance contains excessive construction standards, excessive risk management (insurance/ | None. |

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| | indemnification/ security fund) language, and excessive application/ registration requirements, including a description of the purpose and use of the facilities. All major local exchange carriers, as well as, the state telecom-munications association have indicated a willingness to challenge any municipality which chooses to adopt the municipal league proposed ordinance. | |
| G. Local Municipal Organizations An Unreasonable and Overly Burdensome ROW Ordinances | 1. **Municipal Association of South Carolina**<br><br>Municipal Association of South Carolina has advocated to all of its members a model right-of-way ordinance which includes onerous operational standards unrelated to ROW use, and doubles the level of franchise fees collected by municipalities within the state. [Carriers currently pay approx. 1.5% in franchise fees, proposed model ordinance increases to 3%]. Some of the unreasonable operational standards in the model include the city proscribing minimum cover for underground facilities and installation of facilities in particular locations to preserve "visual qualities" (the objection to this is that there are occasions where it is not possible to relocate facilities: a provider should have the discretion to make determinations based on unique service requirements or technical specifications and not solely aesthetics). | The South Carolina MASC ordinance was recently preempted by statewide legislation. However, the MASC proposal, for the past year and a half, has created an unreasonable administrative burden upon the carriers operating in South Carolina. |
| | 2. **Metropolitan Area Communications Commission (MACC), Oregon**<br><br>In November, 1998, MACC distributed its "Master Telecommunication Ordinance" intended to be used by Oregon cities. This model contains numerous objectionable provisions, including the imposition of additional fees and charges that appear contrary to | None. |

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| | Oregon state law which allows for a privilege tax up to seven percent of gross receipts in lieu of additional fees. | |
| | 3. **Numerous cities Nationwide**<br><br>Certified professional engineering certification for even the most routine, minor ROW activities. Such certification is costly and exceeds generally accepted engineering practices and, particularly in minor projects such as routine service drops, serves no legitimate purpose in ROW management. | Some cities are willing to drop or remove the certification for certain activities, however this is usually a part of a lengthy and costly negotiating process. |
| H. Miscellaneous Burdensome and Excessive ROW Provisions | 1. **City in Washington**<br><br>Demands for GIS (satellite) mapping, and provision of maps or other technical data in whatever form or media proscribed by the City. | After lengthy and costly negotiation, the City agreed to remove these unnecessary and costly requirements. |

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# APPENDIX B:

## Committee on State Taxation ("COST") 50-State Study and Report on Telecommunications Taxation